Supreme Court, U.S.
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No. 91-1395

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE CELOTEX CORPORATION
Petitioner,
v.
WILLAM EARL GLASSCOCK, et al.,
Respondents.

On Petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Supreme Court, in *Pacific Mutual Insurance Co. v. Haslip*, provide appropriate and meaningful guidelines to state and lower federal courts in reviewing due process challenges to punitive damage awards?

2. Whether the Texas common law system, as defined by the Texas Supreme Court, provides sufficient due process safeguards for the imposition of punitive damages?

3. Whether a ratio of punitive damages awarded compared to actual damages ranging from 1:1 to 6:1 in eleven consolidated cases violates due process after sufficient jury instructions and complete appellate review?

4. Whether the assessment of punitive damages in the asbestos litigation involving individual lawsuits relating to specific individual harm violates due process.

LIST OF PARTIES

Petitioner, The Celotex Corporation, was the Defendant/Appellant below.

Respondents are:

William Earl Glasscock
Roy B. Ghent
Lois T. Ghent
Charles Marsh
Leta Faye Marsh
Charles A. Reich
Gary N. Starkey
Linda Starkey
Gus Geisler, Sr.
Lena Geisler
Malvin R. Lane
Nancy Lane
Carlos Gonzalez
Delia Gonzalez
William E. Smith
Sandra Smith
James W. Phillips
Barbara E. Phillips

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Respondents.

On Petition for Writ of Certiorari
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for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

GROUNDS FOR JURISDICTION

The United States Court of Appeals entered an Order on October 24, 1991, affirming the decision of the District Court. The United States Court of Appeals denied Petition for Rehearing and Suggestion for Rehearing En Banc on December 2, 1991. This Court has jurisdiction to review the Judgment in this case by Writ of Certiorari pursuant to 28 U.S.C. §1254(i).

Jurisdiction in the District Court was based on 28 U.S.C. §1332(a).

STATUTES INVOLVED

This Petition involves the Due Process clause of the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

This lawsuit involves eleven consolidated actions alleging personal injury resulting from exposure to asbestos contained in products manufactured and sold by the Petitioner. The basis of the underlying claims are strict liability/failure to warn and gross negligence. All of the other defendants except the Petitioner settled prior to the verdict. After a lengthy trial the jury rendered a verdict in favor of the Respondents awarding compensatory and punitive damages. After extensive post-verdict motions and careful review, the District Court entered Judgment based upon the jury verdict.

This appeal involves specific allegations of misconduct by this defendant and individualized harm to specific individuals. The jury properly awarded damages based solely upon the conduct of this defendant as it related to each individual. Celotex was not and has never been punished for the "same course of conduct" for "all injured individuals exposed to its products."

In an attempt to impugn the jury verdict Celotex compares actual damages to exemplary damages, *after credit for contribution* by other defendants and presents a distorted view of the jury verdict. If traditional analysis is applied to the findings of the jury, the comparison of actual damages awarded to punitive damages awarded demonstrates a ratio range of 1:1 to 6:1, as follows:

PLAINTIFF	ACTUAL DAMAGES	PUNITIVE DAMAGES	RATIO
Glasscock	400,000	600,000	1.5
Ghent (Roy)	100,000	600,000	6
Ghent (Lois)	65,000	100,000	1.54
Marsh	600,000	600,000	1

Reich	400,000	600,000	1.5
Starkey	100,000	600,000	6
Geisler	100,000	600,000	6
Lane	100,000	600,000	6
Gonzales	100,000	600,000	6
Smith	100,000	600,000	6
Phillips	300,000	600,000	2

This jury verdict was reviewed according to Texas law by an experienced trial judge prior to entering the Judgment. The Judgment was subsequently reviewed by the Fifth Circuit pursuant to Texas law and this Court's recent decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991). The Fifth Circuit affirmed the Judgment of the District Court and denied Celotex's Petition for Rehearing and Suggestion for Rehearing En Banc on December 2, 1991.

During the pendency of this appeal this same Petitioner filed a Petition for Writ of Certiorari in *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *reh'g denied*, 914 F.2d 251, *cert. denied*, 111 S.Ct. 2236 (1991), No. 90-1490, presenting these same challenges. See Appendix A. This Court denied that Petition.

Contrary to Celotex's argument, the Fifth Circuit reviewed the jury instructions and award in light of the *Haslip* opinion and specifically found that the District Court imposed limitations on the exercise of the jury's discretion to award punitive damages, emphasized that any award of punitive damages was discretionary with the jury, outlined the specific conduct that would warrant an award of punitive damages, and emphasized that the purpose of punitive damages was deterrence and punishment. Additionally, the Fifth Circuit carefully analyzed the post-trial procedures for review of punitive damage awards by Texas law and found that Texas had many of the same features as that found in *Haslip*. Finally, with respect to Petitioner's unwarranted claim that the Texas System of review is merely a "passion

and prejudice review" the Fifth Circuit stated "that the factors set out by the Texas Supreme Court for review of punitive damages clearly distinguishes the Texas systems from the simplistic 'passion and prejudice' analysis referred to in *Haslip*." Obviously, this Court should deny the Petition for Celotex.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS COURT SHOULD DENY THE WRIT BECAUSE *HASLIP* PROVIDED SUFFICIENT GUIDANCE FOR DETERMINING A DUE PROCESS CHALLENGE TO AN AWARD OF PUNITIVE DAMAGES AND TEXAS LAW HAS ESTABLISHED AND PROVIDES SUFFICIENT DUE PROCESS SAFEGUARDS FOR THE IMPOSITION OF A PUNITIVE AWARD IN THIS CASE.

A. THE LOWER COURTS ARE PROPERLY APPLYING *HASLIP*. MORE IMPORTANTLY, IN THIS CASE, THE FIFTH CIRCUIT PROPERLY APPLIED *HASLIP*.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991), this Court gave guidance to the Courts of this country in determining whether or not a punitive damage award comports with the requirements of the Due Process Clause. Following the *Haslip* Opinion, the Fourth, Eighth and Eleventh Circuits, at least, have struck down punitive damage awards on the grounds that the awards did not meet the Supreme Court's due process requirements. Additionally, numerous State Court opinions have found due process violations under this Court's standard. Although the Petitioner complains that this Court's opinion was insufficient

in addressing the issue, it is clear that the Courts of this country have had little problem understanding the test of *Haslip*.

This Court, in *Haslip*, gave very specific guidance concerning due process with respect to proper jury instructions, adequate appellate review, and general concerns of reasonableness of the amount of the award in light of the conduct involved and the harm sustained. A constitutional test for due process applicable to the law of all fifty states must not be so rigid that the individual facts and circumstances of the case cannot be considered. The Petitioner would have this Court impose a rigid standard with no regard for the atrocity committed, individual suffering, or a community sense of fairness and wrong which is the hallmark of the American jury system. This Court has placed meaningful guidelines in motion for the review of a due process challenge to a punitive damage award and should not alter those guidelines.

Finally, the Fifth Circuit, in reviewing this particular case, specifically considered the due process challenge under the guidance of *Haslip*. The Fifth Circuit *in this case* specifically found that the District Court did impose limitations on the exercise of the jury's discretion to award punitive damages, that adequate appellate review of the punitive award was present with specific factors to consider in analyzing the award, and that Texas law had imposed a reasonableness standard in the assessment of punitive damages. Consequently, this Petition should be denied.

B. THE TEXAS COMMON LAW SYSTEM OF ASSESSING AND REVIEWING PUNITIVE DAMAGES DOES PROVIDE SUFFICIENT DUE PROCESS SAFEGUARDS.

Texas common law has embraced the traditional

common law approach for assessment of punitive damages. As this Court stated in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032 (1991):

> Under the traditional common law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by the trial and appellate courts to ensure that it is reasonable...
>
> ... Since every state and federal court considering the question has ruled that the common law method for assessing punitive damages does not in itself violate due process, it cannot be said that that method is so inherently unfair as to be per se unconstitutional. The method was well-established before the Fourteenth Amendment was enacted, and nothing in the Amendment's text or history indicates an intention to overturn it.

Id., at 1042, 1043.

A complete review of this record demonstrates that the jury was given: (1) clear, objective criteria for the imposition of punitive damages; (2) the full panoply of procedural protections; (3) instructions describing the purpose of punitive damages as punishment and deterrence; (4) the instructions required the jury to consider the character and degree of the particular wrong and that the award was not compulsory; (5) the trial court conducted a full post-trial review utilizing established standards to ensure a meaningful and adequate review, including the Petitioner's claim of

multiple prior punitive damage awards; (6) the appellate court conducted a complete review of the evidence supporting the imposition of punitive damages and whether or not the amount of the award was reasonable utilizing established common law standards. Every possible due process safeguard and protection was afforded this Petitioner.

Texas common law has established certain well-recognized rules for the imposition of punitive damages. First, a plaintiff may not recover punitive damages in the absence of a specific finding of actual damages. *Nabours v. Longview Savings & Loan Association*, 700 S.W.2d 901 (Tex. 1985). Second, punitive damages awarded must bear a reasonable proportion to actual damages. *Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Third, the trial court and appellate court must review the award of the jury for excessiveness. In making that review, the trial court and the appellate court *must* consider at least the following factors: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and, (5) the extent to which the defendants' conduct offends the public's sense of justice and propriety. *Id.*, at 910. In addition, this trial court specifically reviewed by post-trial motions and affidavits the history of punitive awards as provided by this defendant. (Plaintiffs have no way to verify the accuracy of the defendant's statements post-trial.) A comparison of these Texas standards with the standards in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S.Ct. 1032, clearly demonstrates that the Texas common law scheme affords sufficient due process protections.

In attempting to support its contention, Celotex quotes only a portion of the instructions given by the Court. However, a complete review of the instructions demonstrates a clear definition of the objectionable conduct and adequate standards for the imposition of punitive damages. The Court instructed the jury, as follows:

The Plaintiffs also claim that the acts of Defendant was done willfully, intentionally, or with a callous or reckless and heedless disregard and indifference to the rights and welfare of the Plaintiffs, and that such conduct entitles them to an award of punitive damages in addition to compensatory damages.

I instruct you that under the law of Texas a heedless and reckless disregard means more than momentarily thoughtlessness, inadvertence, or error of judgment [sic]. It means such an entire want of care as to indicate that the act or omission in question was the result of conscious indifference to the rights, welfare or safety of the persons affected by it.

In their claim for punitive damages, the Plaintiffs claim generally that the Defendant acted willfully, intentionally or with reckless indifference in withholding from the Plaintiffs as well as from the public in general information as to the potential dangers of asbestos products and failed to test its products and to warn Plaintiffs long after the Defendant had actual knowledge of the dangers connected with the use of its products.

The Plaintiffs also contend that this action on the part of the Defendant continued for many years and was knowingly designed by the Defendant to cause the Plaintiffs and their household members and other similarly situated workers to remain ignorant of the

> nature of their asbestos products. If you find for the Plaintiffs and if you further find that the Defendant did act with malice, willfulness, intentionally or with the heedless and reckless disregard or indifference to the rights of others, the law would allow you in your discretion to assess punitive damages against the Defendant as punishment and as deterrent to others.
>
> In making your determination as to punitive damages you will consider the totality of the circumstances, and you may consider the financial resources of the Defendant in fixing the amount of such damages.

The *Glasscock* jury instructions, like the *Haslip* instructions, specifically addressed and directed the jury's attention to the purposes underlying punitive damages -- punishment and deterrence. In addition, the instructions clearly informed the jury that the assessment of such damages was entirely within the jury's discretion. Moreover, the *Glasscock* instructions appropriately set forth, in detail, the nature of the conduct or acts that had to be found by the jury before punitive damages could be imposed.

The appellate review of punitive damages in Texas contains virtually the same features as the Alabama system. As the Fifth Circuit correctly demonstrated, "in Texas, both the trial and appellate courts review punitive damage awards to determine if they are reasonably proportioned to actual damages. *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910. As previously outlined, the Texas Supreme Court has provided factors for the Courts to use when conducting this evaluation. Consequently, the Fifth Circuit correctly rejected the argument of Celotex and stated "that the factors set out by the Texas Supreme Court for review of punitive damages

clearly distinguishes the Texas system from simplistic passion and prejudice analysis referred to in *Haslip*." Texas clearly meets the test of *Haslip* by placing meaningful restraints on jury discretion and providing adequate post-trial review.

C. TEXAS LAW SPECIFICALLY PROVIDES FOR APPELLATE REVIEW OF PUNITIVE DAMAGES AND REQUIRES THAT THE PUNITIVE DAMAGE AWARD BEAR A REASONABLE RELATIONSHIP TO COMPENSATORY DAMAGES.

Texas law has established objective standards for reviewing the amount of punitive damages awarded by the jury. In *Nabours v. Longview Savings & Loan Assoc.*, 700 S.W.2d 901 (Tex. 1985) the Texas Supreme Court states that punitive damages must bear a reasonable proportion to actual damages found by the jury. In addition, in *Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981), the Texas Supreme Court has set out five factors that should be considered in reviewing whether or not an award of punitive damages is reasonable: (1) the nature of the wrong; (2) the character of the conduct involved; and (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties; and (5) the extent to which the conduct offends a public sense of justice and propriety.

Celotex asserts that the individual awards are arbitrary, based on its comparison of punitive awards to actual damages, after credit for contribution. However, if traditional analysis is applied to the findings of the jury, the ratios of total actual damages to the punitive damages range from 1:1 to 6:1, as follows:

PLAINTIFF	ACTUAL DAMAGES	PUNITATIVE DAMAGES	RATIO
Glasscock	400,000	600,000	1.5
Ghent (Roy)	100,000	600,000	6
Ghent (Lois)	65,000	100,000	1.54

Marsh	600,000	600,000	1
Reich	400,000	600,000	1.5
Starkey	100,000	600,000	6
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The pattern and intent of a reasonable jury is apparent, rather than an unduly prejudicial jury as Celotex would contend.

The exposure to each of the plaintiffs was substantially similar with the exception of Lois Ghent. All of the plaintiffs, except Mrs. Ghent, were users of the products. Mrs. Ghent's exposure to asbestos was the result of household exposure through contact with her husband's clothing. The jury, obviously, made a distinction between the duty owed to the end product user and bystander exposure. While that distinction may be argued, it is clearly a distinction a reasonable jury could and did make in exercising its discretion concerning punitive damages. Consequently, the Fifth Circuit correctly held that the punitive awards of this jury were reasonable in relation to the compensatory damages and, following the specific and objective criteria for review under Texas law, affirmed the jury verdict.

II. THE ASSESSMENT OF PUNITIVE DAMAGES IN ASBESTOS LITIGATION RELATES TO SPECIFIC INDIVIDUAL HARM AND DOES NOT VIOLATE DUE PROCESS.

Asbestos litigation began with a single plaintiff seeking recovery for his injuries in the case of *Borel v.*

Fibreboard Paper Products Corp., 493 F.2d. 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869. The full extent of the death and disease caused by the manufacturers of products containing asbestos such as this Petitioner was not known at that time by the plaintiff and has still not been fully realized. Only the Petitioner knew the extent of the exposure throughout this country and the thousands it voluntarily and knowingly exposed to asbestos.

This punitive damage award and every punitive damage award has been specifically related to an individual plaintiff. No recovery was ever made on behalf of all that are harmed nor could such an award be assigned. The exposure of individuals occurred over decades. The degree of harm varies from individual to individual from minor disability to death. It is only through the assessment of individual harm and punishment for that individual harm that punitive damages may be awarded. This litigation is unlike most "mass torts" which involve a single catastrophe. This litigation involves individual exposure to individual products by thousands of men and women over decades.

Celotex urges that it is the combination of past awards and the potential of future awards that violates due process. Thus, it argues, having one punitive damage award against it for one individual, all future plaintiffs' rights should be foreclosed. Such a holding by this Court, on this record, would arbitrarily discriminate between plaintiffs in product liability actions. In essence, such a holding would limit an award for punitive damages to the first plaintiff able to win the race to the courthouse and secure an award, or prohibit punitive damage claims after Celotex selected the award it wanted to pay. Clearly, had one plaintiff sought to recover for all future plaintiffs, Celotex would object that it violated the very Texas standards it complains of in this Petition.

Not only does Celotex's view of due process violate both due process and equal protection principles, it would

completely defeat the purpose of punitive damages, which is to punish the wrongdoer and deter further wrongdoing. For example, if an early award of punitive damages, based on an individual's injury, as in these cases, was in the amount of $500, Celotex could voluntarily pay the award and destroy the very purpose of punitive damages. No longer would there be incentive to rectify the harm of defective products through recall, repair or warning. Nor should this Court arbitrarily decide for future "mass torts" at what level punishment is sufficient without any knowledge of the nature of the wrong, the degree of culpability of the parties, the character of the conduct, and the extent to which the defendant's conduct offends the public sense of justice and propriety. Celotex argues that the potential for multiplicity of punitive damage awards should foreclose the right of those injured to recover punitive damages. In essence, its argument is that it injured and caused death in so many people that it should not be punished. A holding by this Court that a manufacturer who causes death in thousands of people is not subject to punitive damages simply because of the magnitude of the harm, completely destroys the policy of deterrence.

Celotex claims that the purpose of punitive damages is negated because its potential liability *may* exceed its ability to pay and that it has now sought protection by voluntarily seeking bankruptcy. Simply because the amount of damages sustained by plaintiffs wrongfully injured *may* exceed the ability of the defendant to pay has never justified *elimination* of the right of recovery or the basis of recovery. No individual or corporation has the right to protection simply because its conduct was so reprehensible that it consciously and intentionally caused death and disease to 65,000 people. The conduct of Celotex consists of multiple acts over several decades against thousands of individuals. The amount of damages awarded *in this action* is specifically related to the amount of individual damage by each plaintiff. Furthermore,

the extent to which these punitive damages will be actually paid now rests with the bankruptcy court.

The simple fact is that Celotex could have introduced evidence of prior awards paid in punitive damages for the jury's consideration and urge that it had been sufficiently punished. Instead, it chose not to tell the jury of any previous punitive award payment and then complained upon appeal that the award of this jury was unjust because of prior awards.

Celotex quotes language from former Chief Judge Charles Clark of the Fifth Circuit, *Jackson v. Johns-Manville Sales Corp.*, 727 F.2d 506, 524-525 (5th Cir. 1984) *reversed*, 750 F.2d 1314 (5th Cir. 1985) (en banc), *modified*, 781 F.2d 394 (5th Cir. 1986) (en banc). The opinion cited was reversed and the en banc Court, including Chief Justice Clark, specifically rejected this same argument. The en banc opinion cites *Hansen v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984) *cert. denied*, 105 S.Ct. 1749, 84 L.Ed.2d 814 (1985), applying Texas law, stating:

> ...Texas law does not preclude, but, in fact, apparently grants the right to punitive damages awarded in favor of product liability plaintiffs, even in context of mass asbestos litigation with potential for multiple punitive damage awards against a defendant.

Hansen, 734 F.2d at 1036.

Furthermore, this Supreme Court, as recently as May 28, 1991, has refused to grant Writ on this precise argument in *King v. Armstrong World Industries, Inc.*, 906 F.2d 1022 (5th Cir. 1990), *reh'g denied*, 914 F.2d 251, *cert. denied*, 111 S.Ct. 2236 (1991). (A copy of the cover and table of contents of Celotex's brief is attached as Appendix A). Celotex has been afforded the full protection of due process by the trial court and appellate court. Consequently, this

Court should deny this Petition.

CONCLUSION

Contrary to the assertions of Celotex, Texas common law, as previously demonstrated, provided for *fundamental fairness and safeguards* in the award of punitive damages. As previously demonstrated, the jury was fully and fairly instructed concerning gross negligence and the imposition of punitive damages. The trial court and appellate court completely reviewed the underlying evidence and the amount of the award utilizing traditional common law standards. Additionally, both the trial court and the appellate court reviewed Celotex's claim that previous punitive awards should prohibit the imposition of this award.

Clearly, the lower courts recognized that the recovery of punitive damages is an individual right and that these awards were awarded based upon specific individual harm. Celotex chose to present evidence of prior awards in post-verdict motions. The sole evidence was by affidavit, after verdict, without any discovery, cross-examination or investigation concerning the truth of these assertions. The lower courts, after reviewing all of the evidence and instructions upheld the jury verdict. All of the safeguards of due process and Texas law have been afforded this defendant.

Plaintiffs respectfully request that this Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

Respectfully submitted,

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APPENDIX A

NO. 90-_____

In The
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OCTOBER TERM, 1990

THE CELOTEX CORPORATION,
Petitioner,
v.
LLOYD D. KING, LOUAN KING, A.B. WILLIS, MOLLY WILLIS, CLETUS GRESHAM, LARRY JONES, BESS JONES, JOHNNY FOWLER, AND MARY MARBLE, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF ALBERT L. MARBLE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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